STATE OF MICHIGAN

IN THE SUPREME COURT

ANTONIO CRAIG, Minor, by his Next Friend and Mother, KIMBERLY CRAIG,

Plaintiff-Appellee,

-and-

KIMBERLY CRAIG, Individually,

Plaintiff Not Participating,

-vs-

OAKWOOD HOSPITAL, a Michigan Corp.,

Defendant-Appellant,

-and-

AJIT KITTUR, MD, DR. GAVINI, DR. LAKE, MARGARET LAWRENCE, RN, J. TYRA, RN, K. KONIETZKO, RN, R. HILL, RN, KAREN SOWISLO, DIRECTOR OF MEDICAL RECORDS, CHILDRENS HOSPITAL, DR. R. ASMAR, DR. CASH, DR. HERMAN GRAY, DR. H. WALKER, DR. MARY LOGAN, DR. CAROLYN JOHNSON,

Defendants Not Participating,

-and-

ASSOCIATED PHYSICIANS, PC & ELIAS G. GENNAOUI, MD & HENRY FORD HOSPITAL d/b/a HENRY FORD HEALTH SYSTEM,

Defendants.
_____/

Supreme Court
No. ~~121949~~ 124179

Court of Appeals
No. 206951

L.C. No. 94-410-338-NH

BRIEF OF AMICUS CURIAE THE DEFENSE RESEARCH INSTITUTE AND MICHIGAN DEFENSE TRIAL COUNSEL

PROOF OF SERVICE

FOSTER, SWIFT, COLLINS & SMITH, P.C.
THOMAS R. MEAGHER (P32959)
Attorney for Michigan Defense Trial Counsel
313 South Washington Square
Lansing, MI 48933-2193
(517) 371-8161

PLUNKETT & COONEY, P.C.
MARY MASSARON ROSS (P43885)
Attorney for Amicus Curiae
The Defense Research Institute
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

TABLE OF CONTENTS

Page

INDEX TO AUTHORITIES

Page

MICHIGAN CASES

FEDERAL CASES

STATUTES

LAW REVIEW MATERIAL

MISCELLANEOUS

STATEMENT OF THE QUESTION PRESENTED

DOES A TRIAL COURT'S GATE-KEEPING ROLE UNDER MRE 702 REQUIRE IT, IN ADVANCE OF TRIAL, TO EXAMINE SCIENTIFIC, TECHNICAL, AND OTHER SPECIALIZED KNOWLEDGE TO EVALUATE WHETHER THE TESTIMONY WILL ASSIST THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR DETERMINE A FACT IN ISSUE BY CONSIDERING THE STANDARDS OF THE SCIENTIFIC COMMUNITY AND THE ESTABLISHED FACTS OF THE CASE?

Oakwood Hospital answers "Yes."

The trial court answers "No."

The Court of Appeals answers " No."

Amici Defense Research Institute and Michigan Defense Trial Counsel Answer "Yes."

STATEMENT OF FACTS

Amicus Curiae Defense Research Institute and Michigan Defense Trial Counsel adopt the statement of facts and proceedings set forth in Oakwood Hospital's brief on appeal.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a trial court's decision to exclude or admit evidence for abuse of discretion. *Dept of Transportation v Van Elslander*, 460 Mich 127, 128; 594 NW2d 841 (1999). A trial court's decision to admit evidence is within its sound discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 8167 (1998). This Court considers the proper interpretation of a court rule under a de novo standard because it is a question of law. *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002); *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001).

Here, the issue presented involves the interpretation of Michigan Rule of Evidence 702 and whether it allows for introduction of expert testimony that was not based on recognized scientific or medical knowledge and was inconsistent with the established factual record. Amici urge this Court to make clear that proper interpretation of the court rule requires a trial court to bar such evidence if it is determined at a *Davis/Frye* hearing that the testimony lacks any scientific or medical basis and is inconsistent with the established facts. The trial court is obligated by case authority, court rule, and now by statute to conduct a hearing so that each measure of reliability is fully explored. The failure to do so amounts to a violation of any proper interpretation of MRE 702. Review is therefore de novo.

This Court should make clear that a verdict and damage award based on such impermissible and inflammatory testimony cannot be allowed to stand. A "'[l]et-it-all-in' legal theory creates the opportunity" for a jury to accept what amounts to "quackery on

the witness stand." Huber, *Galileo's Revenge: Junk Science in the Courtroom* p 3 (Basic Books 1993 ed). Unless the judiciary adopts a strong stance against such testimony, trial lawyers will continue to offer it in an effort to obtain a verdict or to ratchet up the damages confident in the knowledge that a reviewing court will review the record deferentially and more often than not conclude that any claimed error was harmless.

The prevailing attitude that erroneously admitted evidence was likely harmless should be decisively rejected by this Court. Otherwise, litigants will continue to offer clearly prejudicial and inappropriate testimony secure in the knowledge that any error will not take away a verdict while success will likely increase its amount. The harmless error doctrine was never intended to be used to protect judgments that have been influenced in this way. Unless there is a fair assurance that the judgment was not substantially swayed by the error, a new trial should be required. See e.g. *Kotteakos v United States*, 328 US 750, 765, n 13; 66 S Ct 1239; 90 L Ed 2d 1557 (1945); see also *Powell v St. John Hospital*, 241 Mich App 64; 614 NW2d 666 (2000).

ARGUMENT

A TRIAL COURT'S GATE-KEEPING ROLE UNDER MRE 702 REQUIRES IT, IN ADVANCE OF TRIAL, TO EXAMINE SCIENTIFIC, TECHNICAL, AND OTHER SPECIALIZED KNOWLEDGE TO EVALUATE WHETHER EXPERT TESTIMONY WILL ASSIST THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR DETERMINE A FACT IN ISSUE BY CONSIDERING THE STANDARDS OF THE SCIENTIFIC COMMUNITY AND THE ESTABLISHED FACTS OF THE CASE

A. The Adversary Process Requires Judicial Intervention To Maintain The Integrity Of A Jury Trial As A Source Of Substantial Justice And Truthful Fact Finding.

The American legal system is committed to the adversary process as a means of resolving disputes. The "central concept of the adversary process is that out of the sharp clash of proofs presented by advocates in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society." Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St L J 713, 714 (1983). During trial, the "proof of facts and issues of law are contested by the two partisans in the presence and under the surveillance of an unbiased and presumably competent judge." Paul Lowell Haines, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 Ind L J 445, 447 (1990) quoting Harry Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 Vill L R 957, 968 (1978). In the "ideal model of the adversarial system, impartial decision makers-judge, jury, or some combination thereof-render decisions based on evidence presented

by competent advocates zealously representing their clients' interests in accordance with established rules." Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 Wake Forest L R 671, 674 (1997).

But the adversary system requires restraint "when [the advocate's] desire to win leads him to muddy the waters of decision." Lon Fuller & John D Randall, *Professional Responsibility: Report of the Joint Conference of the American Bar Association and the Association of American Law Schools*, reprinted in 44 ABA J 1159, 1160-1161 (1958). Commentators recognize that "[e]laborate sets of rules to govern the pretrial and post-trial periods (rules of procedure), the trial itself (rules of evidence), and the behavior of counsel (rules of ethics) are all important to the adversary system." Landsman, *supra* at 715. Critics of adversarial excesses warn that today's "high levels of combativeness potentially threaten the effectiveness and legitimacy of trials." Marvin E. Frankel, *Partisan Justice* 9 (1980) quoted in Rosemary Nidiry, *Note: Restraining Adversarial Excess In Closing Argument*, 96 Colum L R 1299 (1996).

The rule is intended to keep junk science out of the courtroom by requiring the trial court to determine that an expert's proffered opinion is based on "recognized scientific, technical, or other specialized knowledge." MRE 702. It is also intended to enhance the integrity of the fact-finding process by avoiding juror confusion due to a purported expert who presents nothing more than personal opinion or untested and speculative conclusions that deviate from analysis and opinions drawn from accepted scientific or technical methods of inquiry. A trial court must consider whether the proffered expert's field is reliable—astrology or necromancy, for example, are not. See

Kumho Tire v Carmichael, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). But that does not end the required inquiry; the trial court must also evaluate the precise theory or technique that the expert proposes describing to determine whether it will be helpful to the jury because it is reliable. See e.g., *General Electric Co v Joiner*, 522 US 136; 118 S Ct 512; 139 L Ed 2d 508 (1997). Finally, the trial court must ascertain whether the expert's opinion is based on facts in the record. If it is inconsistent with the known facts, it must be excluded.

Daubert, Kumho Tire, and Joiner provide guidance for this Court in its interpretation of the Michigan Rules of Evidence. Even before MCL 600.2955 codified the *Daubert* standards into Michigan law and Federal Rule of Evidence 702 was amended to do the same, the clear text of MRE 702 required an active gate-keeping role by the trial court. But unless this Court steps in to give guidance to the bench and bar, those textual requirements will lack meaningful content and juries will continue to deliberate on the basis of unreliable testimony.

The problem of "let-it-all-in legal theory" is that it creates the opportunity for a "credulous jury [to] transform scientific dust into gold." Peter W Huber, *Galileo's Revenge: Junk Science in the Courtroom*, p 3 (Basic Books, 1993). MRE 702, like its federal counterpart, provides a vehicle for preventing such an outcome. But the strictures of the rule were ignored here. Unless there is a fair assurance that the judgment was not swayed by error, relief is required. See e.g. *Kotteakos v United States*, 328 US 750, 765, n 13; 66 S Ct 1239; 90 L Ed 2d 1557 (1945); see also *Powell v St. John Hospital*, 241 Mich App 64; 614 NW2d 666 (2000).

B. A Textualist Interpretation Of MRE 702 Requires The Trial Court To Exclude Expert Testimony Not Based On Recognized Scientific, Technical, Or Specialized Knowledge And To Exclude Expert Testimony That Is Inconsistent With The Known Facts.

MRE 702 requires that the expert testimony be based upon recognized scientific knowledge. See *Nelson v American Sterilizer Co*, 223 Mich App 485; 566 NW2d 671 (1997). Michigan Rule of Evidence 702 provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

The rule, like the federal rule of evidence, contemplates and requires that the trial court serve as a gate-keeper. *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 566 NW2d 671 (1997); *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Such an outcome is embodied within the text of the rule. The rule begins with "[i]f," a word that clearly conditions admissibility of testimony on a trial court determination. In other words, the clear text predicates a ruling allowing expert testimony on the trial court' s determination that "recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702. The word "recognized" connotes a general acknowledgment of the existence, validity, authority, or genuineness of a fact, claim, or concept, *Nelson*, citing *Black's Law Dictionary* (6th ed) p 1271; *Webster's New World Dictionary* (3d ed College Edition) p 1121. The adjective "scientific" connotes the

grounding of an opinion in the principles, procedures, and method of science. *Nelson*, citing *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786, 2789; 125 L Ed 2d 469 (1993). The word "knowledge" connotes more than subjective belief or unsupported speculation. *Id.* When an expert's "factual basis, data, principles, methods, or their application are called sufficiently into question ... the trial judge must determine whether the testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.'" *Kumho Tire Co v Carmichael*, 526 US 137, 149; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

Although these requirements have always been embodied in a proper interpretation of the Michigan rules of evidence, they have recently received increased attention from courts and commentators. Michigan courts have always required rigorous scrutiny of expert testimony to ensure that a jury is not swayed by testimony from an individual claiming special knowledge and expertise but presenting opinions that are not reliably derived from that scientific or technical knowledge. See *Tobin v Providence Hospital*, 244 Mich App 626, 651; 624 NW2d 548 (2001). Likewise, in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993), the United States Supreme Court directed judges to more actively evaluate scientific evidence. This gate-keeping function also applies to skill or experienced-based observations. *Kumho Tire Co v Carmichael*, 526 US 137, 149; 119 S Ct 1167; 143 L Ed 2d 238 (1999). This obligation also goes to the heart of the integrity of the process.

Judicial gate-keeping and appellate review of the decisions are essential because juries usually lack any reliable or consistent basis for evaluating the credibility of expert

witness testimony. *Confronting the New Challenges of Scientific Evidence*, 108 Harv L R 1481, 1509 (1995). Although trial judges may be reluctant to take on this task, evaluation of the scientific or technical reliability and validity of proffered testimony is critical to ensuring a fair process. "Junk science" in courtrooms has been described as "a hodgepodge of biased data, spurious inferences, and logical legerdemain, patched together by researchers whose enthusiasm for discovery and diagnosis far outstrips their skill." Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books 1993 ed) p 3. Such "science" amounts to "a catalog of every conceivable kind of error: data dredging, wishful thinking, truculent dogmatism, and, now and again, outright fraud." *Id.* It has a corrosive effect on the integrity of the process.

Michigan appellate courts have long recognized the critical role of the trial court in limiting proofs at trial to those that are "not only relevant, but reliable." *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485; 566 NW2d 671 (1997). Michigan courts have required the trial court "to determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before the testimony may be admitted." *Id.* at 491. These requirements stem from the language of MRE 702 and have been strengthened even further with the enactment of MCL 600.2955. It is not enough for an expert to blithely announce a conclusion and when pressed for an elaboration to fall back on nothing more than personal belief or ipse dixit.

Nor is an expert's testimony helpful when it is not based on or is contrary to the facts of the case. Michigan Rule of Evidence 702 requires a trial court to determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's

testimony before that testimony may be admitted. MRE 702. See *Nelson*, 223 Mich App at 490. Such a showing requires the court to ascertain that if the proposed testimony contains inferences or assertions, their source rests in an application of scientific methods. The inferences or assertions must be supported by appropriate objective and independent validation based on what is known, such as scientific and medical literature. *Id.* See also, *Anton v State Farm Mutual Auto Ins Co*, 238 Mich App 673, 678; 607 NW2d 123 (1999). A textual interpretation of the rule, therefore, requires the courts to act as gate-keepers to make certain that only proper expert testimony is admitted at trial. This Court should clarify that the language of the rule requires a trial court to act as a gate-keeper and to carefully evaluate proffered opinion testimony to ensure that it satisfies this requirement. If it does not, the testimony must be excluded.

At trial, the plaintiff presented two purported experts, Dr. Paul Gatewood and Dr. Ronald Gabriel, to testify to the alleged cause of Craig's cerebral palsy. But their testimony should have been excluded. Oakwood Hospital details the problems with this proffered testimony. It also elaborates upon its efforts to raise the issue and the troubling refusal of the trial court to enforce the requisites of MRE 702. Testimony that is not supported by well-established scientific medicine must be excluded under the rule. Amici will not reiterate those points here. But where, as here, a purported expert is unable to point to any peer-evaluated objective validation for a theory, it cannot pass muster under the rule. Nor can an expert testify to an opinion that cannot logically be derived from the theory.

Review of decisions applying the federal counterparts to the Michigan rules is helpful to arriving at the proper analytical framework. The *Daubert* factors themselves, as embodied in MCL 600.2955, are also helpful. The statute requires the court to examine both "the opinion" and the "basis for the opinion." *Id.* The statute specifies that the basis for the opinion includes "the facts, technique, methodology, and reasoning relied on by the expert." *Id.* The statute also requires consideration of the following factors:

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

The statute bars admission of testimony based on novel methodology or form of scientific evidence unless the party offering the testimony establishes that "it has achieved general

scientific acceptance among impartial and disinterested experts in the field." MCL 600.2955(2). Thus, a reliable expert opinion must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods. *Cooper v Smith & Nephew, Inc*, 259 F3d 194, 200 (CA 4, 2001).

A theory of causation, which has not been verified or generally accepted, cannot be presented to the jury. *Vargas v Lee*, 317 F3d 498, 501 (CA 5, 2003). See also *Black v Food Lion, Inc*, 171 F3d 308 (CA 5, 1999). Without testimony showing that medical science knows the exact process that results in a disease or the factors that trigger the process, no scientifically reliable conclusion or causation can be drawn. *Id.* at 314. Admission of testimony in these circumstances constitutes reversible error. If the analytical gap between studies on which an expert purports to rely and the expert's conclusion is too great, then the opinion is unreliable and must be excluded. *Joiner*, 522 US at 146-147; *Meister v Med Engineering Corp*, 267 F3d 1132 (DC Cir, 2001); *Rider v Sandoz Pharmaceutical Corp*, 295 F3d 1194 (CA 11, 2002); *Hollander v Sandoz Pharmaceutical Corp*, 289 F3d 1193 (CA 10, 2002); *Glastetter v Novartis Pharmaceutical Corp*, 252 F3d 986 (CA 8, 2001); *Nelson v Tennessee Gas Pipeline Co*, 243 F3d 244 (CA 6, 2001).

The court must also consider whether the proffered opinion is consistent with and based on the facts established at trial. If not, it must be excluded. This Court should squarely hold that the court will enforce the requirements of the rule and grant meaningful relief when expert testimony is erroneously admitted.

RELIEF

WHEREFORE, Amicus curiae The Defense Research Institute and Michigan Defense Trial Counsel respectfully request that this Court reverse the lower court rulings and grant relief as requested by the defendants-appellants.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

By: Mary Massaron Ross

MARY MASSARON ROSS (P43885)
Attorney for Amicus Curiae
The Defense Research Institute
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

FOSTER, SWIFT, COLLINS & SMITH, P.C.
THOMAS R. MEAGHER (P32959)
Attorney for Michigan Defense Trial Counsel
313 South Washington Square
Lansing, MI 48933-2193
(517) 371-8161

DATED: November 6, 2003

STATE OF MICHIGAN

IN THE SUPREME COURT

ANTONIO CRAIG, Minor, by his Next Friend and Mother, KIMBERLY CRAIG,

Plaintiff-Appellee,

-and-

KIMBERLY CRAIG, Individually,

Plaintiff Not Participating,

-vs-

OAKWOOD HOSPITAL, a Michigan Corp.,

Defendant-Appellant,

-and-

AJIT KITTUR, MD, DR. GAVINI, DR. LAKE, MARGARET LAWRENCE, RN, J. TYRA, RN, K. KONIETZKO, RN, R. HILL, RN, KAREN SOWISLO, DIRECTOR OF MEDICAL RECORDS, CHILDRENS HOSPITAL, DR. R. ASMAR, DR. CASH, DR. HERMAN GRAY, DR. H. WALKER, DR. MARY LOGAN, DR. CAROLYN JOHNSON,

Defendants Not Participating,

-and-

ASSOCIATED PHYSICIANS, PC & ELIAS G. GENNAOUI, MD & HENRY FORD HOSPITAL d/b/a HENRY FORD HEALTH SYSTEM,

Defendants.
_____/

Supreme Court
No. 121949

Court of Appeals
No. 206951

L.C. No. 94-410-338-NH

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

CHRISTINE M. WARNEZ, states that on November 6, 2003, a copy of the Brief of Amicus Curiae The Defense Research Institute and Michigan Defense Trial Counsel, was served on MARK L. SILVERMAN, Attorney for Appellee, 999 Haynes, Suite 235, Birmingham, MI 48009; BARBARA H. ERARD, Appellate Counsel for Oakwood Hospital, 500 Woodward

Avenue, Suite 4000, Detroit, MI 48226; SUSAN HEALY ZITTERMAN, Appellate Counsel for Henry Ford Hospital, One Woodward Avenue, Tenth Floor, Detroit, MI 48226; JOHN P. JACOBS, Appellate Counsel for Dr. Gennaoui & Associated Physicians, P.O. Box 33600 Detroit, MI 48232-5600; CHRIS E. ROSSMAN, Michigan Hospital Association; 2290 First National Building, Detroit, MI 48226; and THOMAS R. MEAGHER, Michigan Defense Trial Counsel, 313 South Washington Square, Lansing, MI 48933, by depositing same in the United States Mail with postage fully prepaid.

CHRISTINE M. WARNEZ

Subscribed and sworn to before me
November 6, 2003.

Christine Borghi
Notary Public, Wayne County, MI
My Commission Expires 9/2/2005

Detroit.P0117.P0117.884223-1